Datuk Yap Pak Leong v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KOTA KINABALU) — CASE NO BKI-14–1/2 OF 2013
RAVINTHRAN J
6 MAY 2013

Civil Procedure — Appeal — Facts, finding of — Pure findings of fact by Special Commissioners for Income Tax ('SCIT') — Whether appellate court should interfere — Whether the only reasonable conclusion on evidence contradicted determination of SCIT

Revenue Law — Income tax — Assessment — Appeal against deciding order of Special Commissioners — Business of operating oil palm plantation — Whether deductions may be made for staff quarters, hiring maids, purchase of furniture and gadgets — Expenses incurred in relation to personal and not business purposes — Whether expenses incurred for production of income — Income Tax Act 1967 ss 33(1) & 39(1)

Revenue Law — Income tax — Deduction — Crucial elements to be satisfied under s 33(1) of the Income Tax Act 1967 — Business of operating oil palm plantation — Whether deductions may be made for staff quarters, hiring maids, purchase of furniture and gadgets — Expenses incurred in relation to personal and not business purposes — Whether expenses incurred for production of income — Income Tax Act 1967 ss 33(1) & 39(1)

Revenue Law — Income tax — Penalty — Penalty imposed by following disallowance of deductions and issuance of notices of additional assessment — Whether Director General of Inland Revenue has discretion to impose such penalty — Whether defence of good faith available to taxpayer — Income Tax Act 1967 s 113(2)

The appellant was the owner of a sole proprietorship known as PLY Plantation. PLY Plantation ran a 900 acre oil palm plantation in Sandakan, about five to six hours away from Kota Kinabalu. The income received from PLY Plantation was taxed as the personal income of the appellant. The general manager of PLY Plantation was the appellant's son. The appellant claimed that the general manager was not paid any remuneration for his work as a general manager but was provided employment perquisites in the form of staff quarters and two maids. The general manager had declared these perquisites in his tax returns.

The respondent audited the appellant's financial records for the years 2004 to 2006. During the audit, the respondent was furnished with invoices and receipts in respect of staff quarters upkeep expenses and the purchase of furniture and gadgets. The staff quarters to which the invoices and receipts related to was No 88 Jalan Bukit Bendera in Kota Kinabalu. This premises belonged to the appellant. The respondent disallowed the appellant's claim for deductions for staff quarters upkeep, maid expenses, purchase of furniture and gadget expenses. The respondent also disallowed the appellant's claim for capital allowances on gadgets, namely, MP3 player and ipodNano and furniture. Following the disallowance of the above deductions, the respondent issued notices of additional assessment and imposed a 45% penalty on the appellant under s 113(2) of the Income Tax Act 1967 ('the Act'). The appellant appealed to the Special Commissioner of Income Tax ('SCIT') on the following issues: (a) whether expenses incurred in relation to the staff quarters upkeep, maid expenses and purchases of gadgets and furniture qualified for deduction under s 33(1) and Schedule 3 of the Act; and (b) whether the penalty imposed under s 113(2) of the Act was correct. The SCIT found that: (i) the claim for deduction for the staff quarters and labour quarters upkeep was actually based on expenses incurred for the renovation and upkeep of the appellant's own house at No 88 Jalan Bukit Bendera, Kota Kinabalu and were not deductible; (ii) the expenses of the two maids were not incurred for the production of income because they were engaged to work at the said premises which was not only owned by the appellant but also where he and his wife lived; (iii) the appellant failed to prove that the gadgets (MP3 Players and iPod Nano and others) were used by the general manager in the production of income; and (iv) the penalty was properly and justly imposed because the appellant had submitted incorrect returns for the years 2004, 2005 and 2006. The appellant appealed against the decision of the SCIT.

Held, dismissing the appeal with costs of RM5,000:

(1) The grounds for interfering with the decision of the SCIT are limited. In the case of pure findings of fact, the court would not interfere unless it considers that the only reasonable conclusion on the evidence contradicts the determination of the Special Commissioners (see para 14).

(2) The crucial elements in s 33(1) that need to be scrupulously satisfied would necessarily encompass the following: 'outgoings and expenses', 'wholly and exclusively' and incurred during that period (see para 16).

(3) The general manager would not be housed in a luxurious home which requires expensive upkeep if he were not the son of the employer. Furthermore, the said 'quarters' was five to six hours' drive away from the plantation in question. In the premises, it was impossible to conclude that the provision of the luxury quarters was wholly incurred in the production of income. The 'quarters' in question was a luxury home

owned by the taxpayer. The deductions were therefore a guise to evade tax. Furthermore, the 'repairs' to the house were more in the nature of renovation or renewal. Thus, it could not be considered maintenance expenditure. The same conclusion applied to the provision of two maids for the general manager. The two maids worked at the private residence of the appellant. Therefore, the maid expense could not be said to be wholly and exclusively incurred in production of income. It was also a guise to evade tax. Under s 39(1), deductions from gross income for domestic or private expenses are disallowed (see para 17).

(4) PLY Plantations ran an oil palm plantation. Capital allowances are provided Schedule 3 of the Act in respect of each business which has incurred qualifying expenditure. The appellant completely failed to tender proof or even explain how the gadgets such as MP3 players, iPod Nano and purchase of furniture were used in the production of income in the plantation business. It was quite obvious that these items were used for domestic or private purposes (see paras 19–20).

(5) The respondent had discretion to impose the penalty under s 113(2) and the defence of good faith was not available (see para 24).

[Bahasa Malaysia summary

Perayu adalah pemilik perniagaan tunggal dikenali sebagai PLY Plantation. PLY Plantation mempunyai ladang kelapa sawit seluas 900 ekar di Sandakan, lebih kurang lima hingga enam jam perjalanan daripada Kota Kinabalu. Pendapatan yang diterima daripada PLY Plantation dikenakan cukai sebagai pendapatan peribadi perayu. Pengurus besar PLY Plantation adalah anak lelaki perayu. Perayu mendakwa bahawa pengurus besar tidak membayar apa-apa saraan untuk kerjanya sebagai pengurus besar tetapi diberikan faedah istimewa pekerjaan dalam bentuk rumah kuarters pekerja dan dua pembantu rumah. Pengurus besar telah mengisytiharkan faedah-faedah istimewa tersebut dalam penyata cukainya. Responden telah mengaudit laporan-laporan kewangan perayu dari tahun 2004 hingga 2006. Semasa audit itu, responden telah diberikan invois-invois dan resit-resit perbelanjaan penyelenggaraan rumah kuarters pekerja dan belian perabot dan perlatan. Rumah kuarters pekerja yang mana invois-invois dan resit-resit adalah berkaitan kepada No 88 Jalan Bukit Bendera di Kota Kinabalu. Premis ini adalah milik perayu. Responden tidak membenarkan tuntutan perayu untuk potongan bagi perbelanjaan penyelenggaraan rumah kuarters pekerja, perbelanjaan pembantu rumah, belian perabot dan peralatan. Responden juga tidak membenarkan tuntutan perayu untuk elaun modal untuk peralatan, iaitu, mainan MP3 dan iPodNano dan perabot. Berikutan potongan-potongan yang ditolak tersebut, responden telah mengeluarkan notis-notis taksiran tambahan dan mengenakan penalti 45% ke atas perayu di bawah s 113(2) Akta Cukai Pendapatan 1967 ('Akta tersebut'). Perayu telah merayu kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') berhubung isu-isu berikut: (a) sama ada perbelanjaan yang

ditanggung berkaitan penyelenggaraan rumah kuarters pekerja, perbelanjaan pembantu rumah dan belian peralatan dan perabot layak mendapat potongan di bawah s 33(1) dan Jadual 3 Akta tersebut; dan (b) sama ada penalti yang dikenakan di bawah s 113(2) Akta tersebut adalah wajar. PKCP mendapati bahawa: (i) tuntutan untuk potongan bagi pengubahsuaian dan penyelenggaraan rumah perayu sendiri di No 88 Jalan Bukit Bendera, Kota Kinabalu dan tidak boleh dipotong; (ii) perbelanjaan dua pembantu rumah tidak ditanggung untuk hasil pendapatan kerana mereka dilantik untuk bekerja di premis tersebut yang bukan sahaja dimiliki oleh perayu tetapi juga di mana dia dan isterinya tinggal; (iii) perayu gagal membuktikan bahawa peralatan tersebut (permainan MP3 dan iPodNano dan lain-lain) digunakan oleh pengurus besar dalam hasil pendapatan; dan (iv) penalti tersebut telah dikenakan dengan wajar dan adil kerana perayu telah mengemukakan hasil-hasil yang tidak betul untuk tahun-tahun 2004, 2005 dan 2006. Perayu telah merayu terhadap keputusan PKCP.

Diputuskan, menolak rayuan dengan kos sebanyak RM5,000:

(1) Alasan-alasan untuk campur tangan dengan keputusan PKCP terhad. Dalan kes penemuan fakta sebenar, mahkamah tidak akan campur tangan kecuali ia menganggap bahawa satu-satunya kesimpulan munasabah berdasarkan keterangan bertentangan dengan penentuan Pesuruhjaya Khas (lihat perenggan 14).

(2) Elemen-elemen penting dalam s 33(1) yang perlu dipenuhi adalah seperti berikut: 'outgoings and expenses', 'wholly and exclusively' dan ditanggung semasa tempoh tersebut (lihat perenggan 16).

(3) Pengurus besar itu tidak akan tinggal dalam rumah yang mewah yang memerlukan penyelenggaraan mahal jika di bukan anak majikan. Tambahan pula, 'quarters' tersebut lima hingga enam jam perjalanan menaiki kereta daripada ladang yang dipersoalkan. Dalam premis itu, adalah mustahil untuk membuat kesimpulan bahawa peruntukan kuarters mewah itu ditanggung keseluruhannya dalam hasil pendapatan. 'Quarters' yang dipersoalkan adalah rumah mewah milik pembayar cukai. Potongan-potongan tersebut adalah samaran untuk mengelak cukai. Bahkan, 'repairs' kepada rumah itu lebih kepada pengubahsuaian atau pembaharuan. Oleh itu, ia tidak boleh dianggap perbelanjaan penyelenggaraan. Kesimpulan sama terpakai kepada peruntukan dua pembantu rumah untuk pengurus besar itu. Kedua-dua pembantu rumah itu bekerja di kediaman persendirian perayu. Oleh itu, perbelanjaan pembantu rumah juga tidak boleh dikatakan ditanggung secara keseluruhan dan eksklusif dalam hasil pendapatan. Ia juga adalah samaran untuk mengelak cukai. Di bawah s 39(1), potongan-potongan daripada pendapatan kasar untuk perbelanjaan domestik atau peribadi tidak dibenarkan (lihat perneggan 17).

(4) PLY Plantation mengendalikan ladiang kelapa sawit. Elaun-elaun modal diperuntukkan dalam Jadual 3 Akta tersebut berkaitan setiap perniagaan yang telah menanggung perbelanjaan yang layak. Perayu langsung gagal untuk mengemukakan bukti atau pun menjelaskan bagaimana peralatan seperti permainan MP3, iPodNano dan belian perabot digunakan dalam hasil pendapatan dalam perniagaan penanaman. Adalah jelas bahawa item-item tersebut digunakan untuk tujuan domestik atau peribadi (lihat perenggan 19–20).

(5) Responden mempunyai budi bicara untuk mengenakan penalti di bawah s 113(2) dan bahawa pembelaan berniat baik tidak terdapat (lihat perenggan 24).]

Notes

For cases on assessment, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2443–2478.

For cases on deduction, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2566–2614.

For cases on finding of facts, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1103–1238.

For cases on penalty, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2694–2698.

Cases referred to

Bombay Steamship Navigation Co (pte) Ltd v Commissioner of Income Tax AIR 1965 SC 1201, 1205, SC (refd)

Director-General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd [1990] 2 MLJ 415, SC (refd)

Edwards (Inspector of Taxes) v Bairstow [1965] AC 14, HL (refd)

KT Co v Ketua Pengarah Hasil Dalam Negeri (1996) MSTC 2594 (consd)

Ketua Pengarah Hasil Dalam Negeri v Dr Zanariah binti Ramly (unreported R1–14–12 of 2011), HC (consd)

Malayan Weaving Mills Sdn Bhd v Director General of Inland Revenue [1999] 6 MLJ 405, HC (refd)

River Estates Sdn Bhd v Director General of Inland Revenue [1981] 1 MLJ 99, FC (refd)

Sharikat KM Bhd v The Director-General of Inland Revenue [1971] 1 MLJ 224 (refd)

Legislation referred to

Income Tax Act 1967 ss 33(1), 39(1), 113(1), (2), Schedule 3, Schedule 5, paras 13, 34

Yap Pak Leong, appellant in person.

Ahmad Isyak (Shaqirul Ifzan with him) (Inland Revenue Board) for the respondent.

Ravinthran J:

INTRODUCTION

[1] This is an appeal by way of case stated against the decision of the Special Commissioners of Income Tax ('SCIT') under para 34 of the Fifth Schedule of the Income Tax Act 1967. The main issue for determination before SCIT was whether certain expenses incurred by the appellant, namely, staff quarters upkeep, maid expenses, and purchases of gadgets and furniture qualify for deduction under s 33(1) and Schedule 3 of the Income Tax Act 1967 ('the Act') in computing the adjusted income of the appellant for the years of assessment 2004–2006. The second question is whether the penalty imposed on the appellant under s 113(2) of the Act is correct.

BACKGROUND FACTS

[2] The appellant is a qualified public accountant. He is the owner of a business entity known as PLY Plantation. PLY Plantation runs a 900 acre oil palm plantation in the Sandakan area which is about five to six hours away from Kota Kinabalu. PLY Plantation is not an incorporated company. It is a sole proprietorship owned by the appellant. Thus the income received from PLY Plantation was taxed as the personal income of the appellant. The general manager of PLY Plantation is Yap Fook Chin who is also the son of the appellant. It was the appellant's case that the general manager was not paid any remuneration for his work as a general manager but was provided employment perquisites in the form of staff quarters and two maids. It was also the appellant's case that the general manager had declared these perquisites in his tax returns. The above facts are largely undisputed.

[3] In 2008, the respondent carried out an audit on the financial records of the appellant for the years 2004–2006. It must be stated at this juncture that during the audit, the respondent was furnished with various invoices and receipts in respect of the staff quarters upkeep expenses and the purchase of furniture and gadgets. It was discovered by the respondent that the staff quarters to which the invoices and receipts related to was No 88 Jalan Bukit Bendera in Kota Kinabalu. A search with the Lands and Surveys Department revealed that this premises belonged to the appellant. The end result of this audit exercise was that the respondent disallowed the appellant's claim for deductions for staff quarters upkeep, maid expenses, purchase of furniture and gadget expenses for the years 2004–2006. These deductions were claimed by

A the appellant under the self assessment regime when filing his tax returns for the period 2004–2006. These deductions are neatly set out in grounds of decision of the SCIT as follows:

The appellant's claim	YA 2004 (RM)	YA 2005 (RM)	YA 2006 (RM)
Staff quarters' upkeep	22,234	-	67,724
Sanitation maids' expenses	12,910	12,000	15,000
Labour quarters' upkeep	-	30,356	10,365
Total	35,144	42,356	93,089

[4] The respondent also disallowed the appellant's claim for capital allowances on gadgets, namely, MP3 player and ipod Nano and furniture. The appellant's claim for capital allowance deductions is reflected in the following table:

The appellant's claim	YA 2004 (RM)	YA 2005 (RM)	YA 2006 (RM)
Gadget expenses (MP3 player, Ipod Nano)	470	405	1,511
Furniture	900	10,261	6,846
Total	1,370	10,666	8,357

[5] Following the disallowance of the above deductions, the respondent issued a letter to the appellant on 24 October 2008 together with income and tax computation and three notices of additional assessment. The additional assessment is reflected in the following table taken from the grounds of decision of the SCIT:

Year of Assessment	Date of Additional Assessment	Amount of Additional Tax (RM)
2004	21 October 2008	14,860.41
2005	21 October 2008	21,526.93
2006	22 October 2008	41,646.26

[6] There was a small reduction in the assessed amount as on 12 October 2009, the respondent issued a notice of reduced assessment for the year of assessment 2006 where tax amounting to RM459.10 was discharged. However, the respondent imposed a 45% penalty on the appellant under s 113(2) of the Act. Section 113(2) gives discretion to the respondent to impose a penalty in the case of a taxpayer who submits an incorrect return or incorrect

information.

HEARING BEFORE SCIT

[7] The appellant appealed to the SCIT. At the hearing before the SCIT, the appellant did not take the witness stand or call any witnesses. Instead, he submitted documents for the consideration of the SCIT. The respondent only called one witnesse; the assessment officer ('RW1'). The basic argument of the appellant before the SCIT was that free living quarters and maid expenses were part of the remuneration of the general manager of the PLY Plantation. Furthermore, the general manager had declared these perquisites in his income tax returns. The appellant also argued that the purchase of gadgets and furniture was for the purpose of the appellant's business and therefore were deductible as capital allowances. As for the penalty under s 113(2) of the Act, the appellant argued that it should not be imposed because of the self assessment that was made by him in good faith. The respondent's argument was that the expenses for staff quarters upkeep were not incurred for business purpose but for personal and domestic purposes. As for the purchases of the gadgets and furniture, the respondent contended that the goods were not for business purposes but for personal and private use. In respect of the penalty imposed under s 113(2), the respondent argued that the element of good faith is not relevant.

FINDING OF THE SCIT

[8] The SCIT identified three broad issues for determination which are as follows:

(a) whether the expenses claimed by the appellant ie staff quarters' upkeep, sanitation maids' expenses and labour quarters' upkeep in the years of assessment 2004–2006 as shown in para 2(vi) above are allowable deductions under s 33(1) of the Act;

(b) whether the capital allowances claimed by the appellant on the expenditure incurred on modern gadgets and house furniture are allowable; and

(c) whether the penalties under s 113(2) of the Act imposed on the appellant in this case is correct?

[9] In respect of the first issue, the SCIT found as a fact that the claim for deduction for the staff quarters and labour quarters upkeep was actually based on expenses incurred for the renovation and upkeep of the appellant's own house at No 88 Jalan Bukit Bendera, Kota Kinabalu. This finding was based on the evidence of the assessment officer ('RW1') that the vouchers and receipts found by the audit team related to the said private residence. The SCIT also

found that the said residence is a luxury home and that the receipts for the purported 'upkeep' included the purchase of expensive branded tiles and the like. For this reason, the SCIT disallowed the claim on the ground that the expenses were not wholly and exclusively incurred in the production of the income. The SCIT also found that the expenses of the two maids were also not incurred for the production of income because they were engaged to work at the said premises which was not only owned by the appellant but also where he and his wife lived. RW1 had testified before the SCIT that the two maids were employed for the purpose of performing household chores for the appellant and his family. The SCIT found that even if the maids were brought to Sandakan to clean the staff house there, their main duty was at the Kota Kinabalu luxury home of the appellant. However the claim for deduction was stated in PLY Plantations accounts as expenses for plantation quarters.

[10] In respect of the second issue, the appellant did not tender any evidence but merely submitted that the general manager and his staff had used the gadgets in question. The SCIT found that the appellant failed to prove that the gadgets (MP3 Players and iPod Nano and others) were used by the general manager in the production of income. Under Schedule 3 of the Income Tax Act 1967, capital allowances are given in respect of each business which has incurred qualifying expenditure. In the premises, they disallowed capital allowance on the above gadgets. They came to the same conclusion in respect of the purchase of furniture. RW1 found that expensive furniture had been purchased in Kota Kinabalu to be placed at No 88 Jalan Bukit Bendera which is the private residence of the appellant. The appellant had not denied that the furniture was used at the said residence. However, he had submitted that it was used by the general manager.

[11] The third issue is in respect of the penalty of 45% imposed on the appellant. The SCIT found that the penalty was properly and justly imposed because the appellant had submitted incorrect returns for the years 2004–2006.

DECISION

[12] The issues that arise in the case stated before me are the same issues addressed by the SCIT. However, the appellant had narrowed his arguments. The salient points in his written submissions are as follows. He did not dispute the fact that the upkeep expenses, maid expenses and furniture expenses were all incurred at No 88 Jalan Bukit Bendera. He did not dispute that he is the owner of the said premise and that he lived there with his wife. He also did not quarrel with the submission of the prosecution and the finding of the SCIT that it was a luxury home. However, his argument is that it does not matter that the expenses were incurred in Kota Kinabalu instead of Sandakan where the

plantation is located. He argued that the general manager is entitled to the perquisites of living quarters and maid services as part of his remuneration. Therefore it also did not matter that No 88 Jalan Bukit Bendera was described as 'staff quarters' or 'labour quarters'. He submitted that the fact that general manager is his own son is irrelevant. He emphasised that the general manager was entitled to the said perquisites and had declared the said perquisites in his tax returns. As for the expenses for upkeep, maid expenses and the purchase of gadgets and furniture, he argued that the purchase authorisations were not signed by him as it was a management decision. He submitted that these facts were not considered by the SCIT.

[13] Before considering the merit of the above argument, I shall first consider the burden of proof. The burden of proof in challenging an assessment lies on the taxpayer as para 13 of Schedule 5 of the Income Tax Act 1976 reads as follows:

> 13 The onus of proving that an assessment against which an appeal is made is excessive or erroneous shall be on the appellant

[14] The grounds for interfering with the decision of the SCIT are limited. In the case of pure findings of fact, the court would not interfere unless it considers that the only reasonable conclusion on the evidence contradicts the determination of the Special Commissioners (see *Director-General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd* [1990] 2 MLJ 415). In the famous case of *Edwards (Inspector of Taxes) v Bairstow* [1965] AC 14; 36 TC 202 at pp 224 and 225, Viscount Simonds had this to say:

> For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained.

[15] In the instant case, the SCIT had found as a fact that all the expenses incurred for the 'upkeep' of the 'staff quarters' were in respect of a luxury-home in Kota Kinabalu that is owned and occupied by the appellant. There is no reason to interfere with this finding for two reasons. The SCIT accept the evidence of the assessment officer (RW1) who carried out the audit. RW1 found that the invoices and receipts which supported the said expenses were incurred in Kota Kinabalu to renovate the private residence of the appellant. The second reason is that the appellant has not disputed that the evidence of the RW1 on this point. The appellant did not call any witnesses at the hearing before the SCIT. He only tender documents and made a submission. The finding of fact that the 'sanitation maid expenses' related to two maids who worked in the private residence of the appellant was also not disputed. In the

premises, the only question that arises is a question of law, ie whether these expenses are deductible under s 33(1) as outgoings in the production of income? Section 33(1) reads as follows in part:

> Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including …

[16] The crucial elements in s 33(1) that need to be scrupulously satisfied would necessarily encompass the following:

(a) 'outgoings and expenses';

(b) 'wholly and exclusively'; and

(c) 'incurred during that period'

(see *Malayan Weaving Mills Sdn Bhd v Director General of Inland Revenue* [1999] 6 MLJ 405). In the *Bombay Steamship Navigation Co's case* (AIR 1965 SC 1201, 1205) cited in the local case of *Sharikat KM Bhd v The Director-General of Inland Revenue* [1971] 1 MLJ 224 it was held that:

> Whether a particular expenditure is revenue expenditure incurred for the purpose of business must be determined on a consideration of all the facts and circumstances, and by the application of principles of commercial trading. The question must be viewed in the larger context of business necessity or expediency.

[17] In the instant case, the appellant has argued that his son, the general manager of PLY Plantations is entitled to the perquisites as per the terms of his employment. Therefore it does not matter whether the quarters is provided in Sandakan or Kota Kinabalu. In my opinion, the SCIT correctly rejected this argument. It is a question of fact whether a particular outgoing or expense was incurred in the production of income. In the instant case, as found by the SCIT, the plantation in question is located in Sandakan which is five to six hours drive away from Kota Kinabalu where the so-called staff or labour quarters is located. The general manager was purportedly employed to work as the general manager of this plantation. The expenses for the 'upkeep' actually involved renovation works and purchase of expensive branded household items as found by the RW1. I am aware that the appellant argued the fact that the general manager is his own son is irrelevant. He also emphasised that the general manager did not draw any other remuneration apart from the said perquisites. The relevant issue is whether perquisites in the form of an expensive luxury home which requires costly upkeep was reasonable in the larger context of business necessity or expediency. Although the appellant submitted that the fact that the general manager is his own son is irrelevant, the

question arises whether he would have provided such perquisites if the general manager was not his son. With respect, it would not be perverse for any tribunal to infer that the general manager would not be housed in a luxurious home which requires expensive upkeep if he were not the son of the employer. Furthermore, the said 'quarters' is five to six hours' drive away from the plantation in question. In the premises, it is impossible to conclude that the provision of the luxury quarters was wholly incurred in the production of income. The appellant submitted that it is not relevant that the general manager is provided with a house in Kota Kinabalu instead of Sandakan. If this argument is accepted, it may well be that it is also not relevant if the house provided for the general manager by PLY Plantation is located in Kuala Lumpur or even Singapore. The appellant also argued that the fact that the general manager is his son is not relevant because he and his wife can reasonably expect to be taken care of by their children. However, in the instant case, the 'quarters' in question is a luxury home owned by the taxpayer. The deductions in question are therefore a guise to evade tax. Even, if the luxury home can be considered 'staff quarters' for the general manager, the evidence of RW1 which was accepted by the tribunal is that the 'repairs' to the house were more in the nature of renovation or renewal. For this reason, it cannot be considered maintenance expenditure. The same conclusion can also be applied to the provision of two maids for the general manager. The two maids worked at the private residence of the appellant. It is granted that the general manager and his family also lived there and he was entitled to two maids under his contract of employment. However, the appellant agreed that he and his wife lived there as well. Therefore, the maid expense cannot be said to be wholly and exclusively incurred in production of income. It would be thoroughly impractical for the appellant to take the position that he did not obtain any benefit of the services of the two maids. It is granted that a parent should be able to enjoy the services of the household staff of his children. However, in this case the parent is also the employer who provided the said services of the maid in the first place. In the premises, the conclusion that it is a guise to evade tax by claiming deductions for domestic expenses cannot be avoided. Under s 39(1), deductions from gross income for domestic or private expenses are disallowed. Section 39(1), in part, reads as follows:

> Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of —
>
> (a) domestic or private expenses;
>
> (b) any disbursements or expenses not being money wholly and exclusively laid out or expended for the purpose of producing the gross income.

[18] Therefore, even if the appellant can establish that the provision of the

'staff quarters' or 'sanitation maid services' was a genuine perquisite of the general manager and therefore incurred in the production of income under s 33(1), the SCIT were justified in concluding that these were domestic or private expenses because they relate to a luxury home in Kota Kinabalu that is owned by the appellant. Furthermore, as I said, the general manager is his own son.

[19] I shall consider the claim of capital allowances in respect of the purchase of the gadgets and furniture. PLY Plantations runs an oil palm plantation. Capital allowances are provided Schedule 3 of the Income Tax Act 1967 in respect of each business which has incurred qualifying expenditure. In *River Estates Sdn Bhd v Director General of Inland Revenue* [1981] 1 MLJ 99, Lee Hun Hoe CJ gave the following examples of qualifying expenditure in respect of a plantation business:

> For instance, in running a plantation a person would have to incur capital expenditure in —
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> (i) clearing land for planting of approved crops;
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> (ii) planting approved crops on the land cleared;
>
> (iii) constructing roads on the estate; and
>
> (iv) constructing buildings in the estate for the welfare and the accommodation of those working in the estate.

[20] In the instant case, the appellant is claiming for capital allowances on gadgets such as MP3 players, iPod Nano and purchase of furniture. The appellant admitted that these items were used by the general manager. However the appellant completely failed to tender proof or even explain how these items were used in the production of income in the plantation business. It is quite obvious that these items were used for domestic or private purposes. As for the purchase of furniture, the appellant agreed that it was used by the general manager at No 88 Jalan Bukit Bendera, Kota Kinabalu.

[21] However, the appellant gave no evidence that it was used in the production of income or purpose of business or otherwise fell under Schedule 3 as qualifying expenditure.

[22] The final issue is whether the penalty imposed by the respondent under s 113(2) of the Act is correct. Section 113(2), in part, reads as follows:

> Where a person —
>
> (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; …

[23] The appellant had submitted before the SCIT that he had applied the deductions in question under the self assessment regime in 'good faith'. Therefore, the argument is that he should not be penalised. The SCIT held that 'good faith' as a defence only applies if a taxpayer is prosecuted under s 113(1) of the Act. The relevant part of the sub-s read as follows:

(1) Any person who —

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

… shall, unless he satisfies the court that the incorrect return or incorrect information was made or given *in good faith*, be guilty of an offence and shall, on conviction, …. (Emphasis added.)

[24] The SCIT noted that the defence of 'good faith' is not provided if the respondent penalised a taxpayer for submitting incorrect returns or incorrect information under s 113(2). In my opinion, the SCIT is entirely correct in concluding that the respondent has discretion to impose the penalty under s 113(2) and that the defence of good faith is not available. In the SCIT case of *KT Co v Ketua Pengarah Hasil Dalam Negeri* (1996) MSTC 2594, Special Commissioner of Income Tax, Mr Augustine Paul (later Federal Court judge) held as follows:

The appellants also claimed good faith as a defence. They argued that since it is provided as defence under s 113(1) of the Act it should apply with equal force under s 113(2) as well. The short answer to the argument is that it is not applicable under s 113(2) for the simple reason that no provision has been made for it therein. It is settled law that in taxing Act one has to look merely at what is clearly said (see *Cape Brandy Syndicate v IRS* 12 TC 258).

[25] Although the above decision is not binding on the High Court, I find it highly persuasive as it is grounded on sound principle and undeniable logic. The same position was taken in the case of *Ketua Pengarah Hasil Dalam Negeri*

v Dr Zanariah binti Ramly (unreported R1–14–12 of 2011) where the High Court stated as follows by way of obiter:

> … the issue of penalty was not covered in the appeal, but as the revenue was successful in the appeal, that means that the respondent Dr Zanariah had filed an incorrect or inaccurate tax return for the years under review and it is only fair that the penalty that was imposed by the Revenue be re-imposed as part of this order of this court that has allowed the appeal. I agree that s 113(2) of the ITA does not provide for good faith as a defence in a situation where no prosecution has been mounted against the respondent taxpayer …

[26] I therefore find that the SCIT did not commit any error of law in affirming the decision of the respondent in imposing the penalty under s 113(2) of the Act.

[27] For all the above reasons the appeal is wholly dismissed with costs of RM5,000.

Appeal dismissed with costs of RM5,000.

Reported by Kanesh Sundrum